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March 11, 2014

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-FINRA-2014-006
Proposed Rule Change Relating to Per-Share Estimated Valuations for Unlisted DPPs and REITs

Dear Ms. Murphy:

On behalf of the Public Investors Arbitration Bar Association ("PIABA"), I thank the Financial Industry Regulatory Authority ("FINRA") for the opportunity to comment on the proposed amendment to NASD Rule 2340 and FINRA Rules 2310 and 5110. PIABA is a national, not-for-profit bar association comprised of attorneys, including law professors and regulators, both former and current. PIABA members who are practicing attorneys devote a significant portion of their work time representing public investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in securities and arbitration forums and has advocated for investor education and investor rights. Our members and their clients have a strong interest in rules promulgated by FINRA relating to both investor protection and disclosure.

With its proposed rule change, FINRA proposes for the third time in three years amendments to NASD Rule 2340 with respect to the information which must be disclosed or may be disclosed on customer account statements concerning the values of unlisted direct participation program ("DPP") and unlisted real estate investment trust ("REIT") securities. The proposed amendments to FINRA Rules 2310 and 5110 would revise issuer valuation reporting requirements that must be met for member firms to be able to sell unlisted DPP and REIT securities. With the proposed rule amendments, FINRA, once again, falls far short of its investor protection mission.

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PIABA has maintained a consistent position with respect to proposed rule changes directed to NASD Rule 2340. Investors are entitled to accurate information concerning the value of their DPP and REIT securities throughout the offering period and after the offering period. To ensure that investors are provided with this information, FINRA could and should prohibit member firms from selling DPP units or non-traded REIT shares of issuers who fail to provide in each annual report valuations of their securities based upon third party appraisals. If broker/dealers were prohibited from DPP units or non-traded REIT shares of issuers who refuse to provide share valuations annually based upon independent appraisals of the assets, liabilities, and operations of the program or REIT, then issuers would be compelled to comply with that requirement to ensure that their shares could be sold to the investing public by broker/dealers.

FINRA's refusal to adopt this approach will allow member firms and their registered representatives to continue to use one of the two primary selling points for the marketing DPPs and non-traded REITs. That selling point is that investors can escape the volatility of the stock market by purchasing DPP units or non-traded REIT shares. The reality is contrary to that selling point. Both DPP units and non-traded REIT shares are illiquid investments for which there is no market, other than limited secondary markets in which DPP units and non-traded REIT shares can only be sold at substantial discounts. There has been no volatility in the per share prices for two reasons: (1) there has been no market for the units and shares; and (2) FINRA has allowed member firms to include cost basis as the value of the units and shares on customer monthly statements.

NASD Rules 2340 and 2710 were amended in 2000 with the goal of providing accurate per share valuation reporting on customer account statements of DPP units and non-traded REIT shares. However, the accepted industry practice since those rule amendments became effective has been for issuers to report in their annual reports the "value" of REIT shares at cost basis and member firms to report cost basis valuation on monthly statements for those securities. FINRA placed its stamp of approval on that practice in Notice to Members 09-09, which PIABA believes was contrary to the express language of NASD Rules 2710 (currently FINRA Rule 5110) and 2810 (currently FINRA Rule 2300), and is clearly contrary to FINRA's investor protection obligations.

The current proposed rule change is the third attempt by FINRA to prevent the use of cost basis as a valuation on customer account statements. However, the proposed rule amendments fall short of requiring accurate valuation reporting on customer account statements. Indeed, the proposed amendment to NASD Rule 2340 eliminates any requirement for a member firm to include a per share estimated value of DPP units or non-traded REIT shares in customer account statements.

Sales of non-traded REIT securities are exploding. In 2012, non-traded REIT issuers raised $10.3 billion, and in 2013, they raised $20 billion. This drastic increase in sales of non-traded REIT securities emphasizes the need for accurate valuation reporting on customer account statements.

The proposed amendments to FINRA Rule 2310 fall far short of prohibiting member firms from selling DPP and unlisted REIT securities unless issuers will include in their annual reports share valuations based upon independent appraisals of assets, liabilities, and operations of the program or the REIT. The proposed amendments to Rule 2310(b)(5) would allow member firms to sell these securities if one of two conditions is met: (1) "a per share estimated value is calculated on a periodic basis in accordance with a methodology disclosed in the prospectus"; or (2) the issuer has agreed to provide a per share estimated value in its first annual report following the second anniversary of breaking escrow, which valuation is calculated by a third party valuation expert or is prepared with the material assistance of such an expert.

The first valuation methodology allowing member firms to sell these securities is far too broad and indefinite. There is no limitation on or definition of how such per share estimated value may be calculated. There is no description of how often such an estimated value must be calculated other than on a "periodic basis". There is no definition or description of an acceptable "methodology" to be used in calculating the estimated value. If FINRA interprets the requirements of the proposed Rule 2310(b)(5)(A) as broadly as it interpreted the requirements of FINRA Rules 5110(f)(2)(M) and 2310(b)(5), then issuers will be allowed to "calculate" the per share estimated value by disclosing in the prospectus that the "methodology" for "calculating" estimated value is the cost basis of the security. The breadth and indefiniteness of proposed FINRA Rule 2310(b)(5)(A) defeats FINRA's express purpose of the proposed rule change to provide accurate and reliable per share estimated valuation information to customers on their account statements.

FINRA's proposed amendments to NASD Rule 2340 are also troubling. Those amendments start with eliminating any requirement on the part of a member firm to include on a customer account statement a per share estimated value of a DPP or REIT security. The member may do so, so long as the "per share estimated value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that the per share estimated value is unreliable", and the required disclosures are provided.

The proposed amendments to Rule 2340 describe two per share estimated value methodologies that will be presumed by it to be reliable. Broadly speaking, the first methodology allows member firms for a limited period of time to use per share proceeds, net of offering expenses and net of described distribution coverage shortfalls as a per share estimated value. The second methodology allows member firms to use a per share estimated value contained in the annual report, which valuation has been determined by a third party expert or such an expert has provided material assistance in determining the valuation.

Allowing member firms to use the "net investment" methodology is an improvement over the current practice of reporting cost basis, but falls far short of providing a valuation based upon the assets, liabilities, and operations of the DPP or non-traded REIT.

The most troubling aspect of the proposed amendments to Rule 2340 is the optional nature of providing any valuation reporting. In FINRA's discussion of the optional nature of estimated value reporting on customer statements, FINRA stated:

> FINRA believes that members and program sponsors have a strong incentive to provide these valuations; they know their customers react negatively to seeing their positions shown without a value. If the Commission approves the proposal, FINRA will monitor for changes to business practices and, if there is a significant shift to not presenting a valuation, then FINRA will reconsider the optional nature of the proposal.

PIABA submits that issuers of DPPs and non-traded REITs and member firms whose registered representatives are selling these securities have no incentive to report during the offering period or thereafter a per share estimated value that is less than the cost basis of each share. Reporting a reduced per share estimated value would inhibit sales at a member firm level and would inhibit the raising of capital at the issuer level.

To meet its investor protection obligations, FINRA should amend Rules 2310 and 5110 to prohibit general securities members from selling DPP units or non-traded REIT shares unless issuers of such units or shares will provide in each annual report a valuation of the units or shares based upon an independent appraisal of the assets, liabilities, and operations of the program or REIT. FINRA's failing to do so will allow sponsors and issuers to continue to have member firms sell unsuitable DPP units and non-traded REIT shares to investors, many of whom are seeking safety of principal and income. In addition, Rule 2340 should require the reporting of those appraised values unless a member firm reasonably believes that the per unit or per share estimated value is unreliable. In that event, consistent with the NASD's prior interpretation of Rule 2340, member firms should be required to report an estimated value based upon an analysis of the audited financial statements of the program or REIT prepared by independent valuation services.

Sincerely,

Scott C. Ilgenfritz
PIABA, Immediate Past-President

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